January 5, 2009

Re: **Transland Inc. et al, December 17th Pre-hearing Conference**

To Whom it may concern,

Enclosed you will find the corrected version of the 12.17.08 hearing in the matter of Transland Inc. The corrections in speaker identifiers were sent to us from John Bell, Esq, they have been made and resent to all the appropriate parties. Please let us know if you have any questions.

Sincerely,

Jen Stello

U.S. DEPARTMENT OF TRANSPORTATION

+ + + + +

OFFICE OF HEARINGS
WASHINGTON, D.C.

+ + + + +

PRE-HEARING CONFERENCE

+ + + + +

IN THE MATTER OF: TRANSLAND, INC., BRIAN WILSON, CHARLES ROBERTS, CHRISTOPHER CARTER, JAMES DEJONGE, MICHAEL SLAUGHTER, ALFONSO GONZALES. Respondents	Docket Nos. FMCSA-2006-25348, 25349, 25350, 25351, 25352, 25353, and 25354

Wednesday, December 17, 2008
Telephone Conference

The above-entitled matter came on
for hearing pursuant to notice, at 3:00 p.m.
Eastern Standard Time.

BEFORE: THE HONORABLE RONNIE A. YODER
          Chief Administrative Law Judge

APPEARANCES:

On Behalf of the Respondents:
ANTHONY J. McMAHON, ESQ
5009 Sentinel Drive
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On Behalf of the Agency:
JOHN C. BELL, ESQ.
Of: Federal Motor Carrier Safety Admin.
Eastern Service Center
802 Cromwell Park Drive, Suite N
Glen Burnie, Maryland 21061
(443) 703-2249

1   P-R-O-C-E-E-D-I-N-G-S

2   3:05 p.m.

3   ADMIN. JUDGE YODER: Okay. On the

4   record.   This is a pre-hearing telephone

5   conference in the matter of Transland, Inc.,

6   and others, Docket Nos. FMCSA-2006-25348,

7   25349, 25350, 25351, 25352, 25353, and 25354.

8   On the phone we have four people;

9   for the Complainant, John C. Bell, attorney

10   with the Federal Motor Carrier Safety

11   Administration, who will be speaking for the

12   Field Administrators today. Also on the line

13   is Darin Jones from the Chicago Office of

14   FMCSA. Mr. Jones, you're an attorney?

15   MR. JONES: No, sir.   I'm the

16   Field Administrator.

17   ADMIN. JUDGE YODER: Oh, I see.

18   Okay.

19   MR. BELL: Your Honor, is it

20   necessary for Mr. Jones to -- I was under the

21   impression that it wasn't necessary for Mr.

22   Jones to participate in this call. Is that

1   going to be necessary?

2   ADMIN. JUDGE YODER: Not at all,

3   as long as you have authority to do whatever

4   is necessary to settle this matter.

5   MR. BELL: I do have Mr. Jones'

6   authority so, with that, I would like to ask

7   that Mr. Jones be excused.

8   ADMIN. JUDGE YODER: Yes.   I

9   assume that he was called, just because he's

10   on the service list.

11   COURT REPORTER: Your Honor, this

12   is the court reporter.   I'm going to ask that

13   people identify themselves.

14   ADMIN. JUDGE YODER: Yes.   That

15   was Mr. Bell.

16   MR. BELL: I would apologize.

17   This is John Bell again.   I was under the

18   impression from, Your Honor, your office, I

19   believe,   that   Mr.   Jones   presence   was

20   necessary.   But if it's not --

21   ADMIN. JUDGE YODER: As long as

22   you have the authority to settle this matter,

1   that's all I need.

2   MR. BELL: Then Mr. Jones, I

3   guess, thank you for calling in.

4   MR. JONES: Thank you.   I'll sign

5   off.

6   ADMIN. JUDGE YODER: Okay.   All

7   right.   For Respondents, we have Anthony J.

8   McMahon and Keith L. Sachs.   And McMahon will

9   be speaking for the Respondents.

10   I   called   the   pre-hearing

11   conference   because   of   the   petition   with

12   respect to the settlement agreement, which was

13   submitted to me for approval.   And I thought

14   we needed to address some of the issues that

15   have been raised and see if we can't move this

16   off dead center.

17   Mr.   Bell,   I   don't   think   I   have

18   ever received a proposed settlement in which

19   one of the parties said they didn't want it.

20   I mean,   I've been doing this for what,   23

21   years at DOT and 33 years over all.   This is

22   the first time I've ever gotten a settlement

1 agreement where one of the parties says we

2 don't want it. You think it should be

3 approved anyway.

4 MR. BELL: Yes. This is John Bell

5 again, just for the record. Yes, Your Honor.

6 I've had -- if you read through the terms of

7 the settlement agreement, what is says is that

8 the Respondent had -- once executed by the

9 Respondent, it could not be withdrawn for 30

10 days. It couldn't -- the Respondent could not

11 withdraw his agreement to the settlement

12 agreement. Here, the Respondent signed it on

13 the 20 -- signed the settlement agreement on

14 the 20th of November; mailed it on the 24th;

15 and then, shortly thereafter, decided that

16 they didn't want to settle this case anymore.

17 At that point, they had agreed to it and they

18 had agreed that they could not withdraw from

19 it for 30 days.

20 ADMIN. JUDGE YODER: Well, you

21 referred to this as a final agreement. I

22 mean, the agreement says it's final, once it's

1 executed by the Field Administrators. Is that

2 your position?

3   MR. BELL: Well, it's final,

4 subject to the acceptance by Your Honor -- by

5 the Administrative Law Judge. And I believe

6 the next step is that it's also submitted to

7 the Assistant Administrator. I believe it's

8 a final order -- considered to be a final

9 agency order under 349 CFR 386-22.

10   ADMIN. JUDGE YODER: Well, I'm

11 inclined -- it's a final order if I approve

12 it.

13   MR. BELL: Right. That's correct,

14 Your Honor. That's where I was going with

15 that.

16   ADMIN. JUDGE YODER: And if I

17 don't approve it, it's nothing.   And the

18 agreement really shouldn't say that it's final

19 when it's executed by the Field Administrator,

20 because it isn't. Do you know what I mean?

21   MR. BELL: I agree with you, Your

22 Honor.   And, if you read through the

1 pleadings, I was not involved in the drafting

2 of this settlement agreement. And so, I just

3 really can't speak to what its terms were. I

4 believe that it was drafted -- it says that it

5 was jointly drafted by the Field Administrator

6 and Transland.

7 ADMIN. JUDGE YODER: You have

8 looked at it, have you not?

9 MR. BELL: I have looked at it.

10 ADMIN. JUDGE YODER: Does it

11 differ from forms that you're familiar with?

12 MR. BELL: It -- it -- as far as

13 the terms of the settlement agreement, or as

14 far as that specific section that you're

15 referring to?

16 ADMIN. JUDGE YODER: Either one.

17 MR. BELL: The settlement

18 agreement forms that are typically used when

19 a case is settled prior to going before a --

20 before a decision maker, have -- has the

21 language that it's final upon execution by the

22 Field Administrator. And I believe that that

1 language may have made it into this settlement

2 agreement inadvertently.

3   ADMIN. JUDGE YODER: Yes. Okay.

4   MR. BELL: And so, if the Field

5 Administrator agrees that this settlement

6 agreement is not final until accepted by the

7 Administrative Law Judge.

8   ADMIN. JUDGE YODER: Is it your

9 understanding that it can't be withdrawn by

10 Transland for 30 days. Does that mean it can

11 be withdrawn after 30 days?

12   MR. BELL: I -- the intent of the

13 language is -- my understanding of the intent

14 of the language is that, for 30 days, the

15 Field Administrator has the opportunity to

16 consider the -- consider the terms of the

17 settlement agreement, once it's executed by

18 the Respondent. If the Field Administrator

19 fails to counter sign within the 30 days,

20 then, at that point, the Respondent is free to

21 withdraw its --

22   ADMIN. JUDGE YODER: You think it

1   gives the Field Administrator a 30-day option?

2   MR. BELL: That's the way that I

3   understand it. Yes, sir.

4   ADMIN. JUDGE YODER: Do you think

5   there's any consideration to that option?

6   MR.   BELL: Is   there   any

7   consideration for the option?

8   ADMIN. JUDGE YODER: Yes, sir.

9   MR. BELL: For the 30 days?

10   ADMIN. JUDGE YODER: Yes, sir.

11   MR. BELL: I think that the

12   agreement is there's consideration on both

13   sides.   In this case, I think that the Field

14   Administrator has given it a significant --

15   significant consideration for all the terms in

16   this settlement agreement, by agreeing to the

17   conditional   reduction   of   the   amount   and

18   agreeing to an eight month payment plan on a

19   significant amount of money, with no interest

20   charged.

21   ADMIN. JUDGE YODER: Can you hear

22   me?

1   MR. BELL: I'm sorry if I spoke

2 over you. I can hear you now.

3   ADMIN. JUDGE YODER: Are you using

4 a speaker phone?

5   MR. BELL: I am. Would you like

6 me to take it off?

7   ADMIN. JUDGE YODER: I don't want

8 to be on a phone where you can't hear me and

9 where you talk over me.

10   MR. BELL: I apologize, Your

11 Honor.

12   ADMIN. JUDGE YODER: All right.

13 So you think that there's consideration

14 running to Transland because the Field

15 Administrator has agreed to certain things in

16 the settlement? Is that what you said?

17   MR. BELL: Yes.   That is what I

18 said.

19   ADMIN. JUDGE YODER: Well, the

20 settlement isn't binding on the Field

21 Administrator. Is that right? Until he signs

22 it.

1   MR. BELL: Until he signs it.

2   Right.

3   ADMIN. JUDGE YODER: All right.

4   So what is the consideration for the 30-day

5   option?

6   MR. BELL: I'm not sure that I

7   understand your question, Your Honor.

8   ADMIN. JUDGE YODER: Well, you're

9   saying that Transland is bound by a 30-day

10   commitment. What's the consideration for that

11   commitment?

12   MR. BELL: The Field Administrator

13   has given -- the consideration is the entire

14   agreement they settled upon.

15   ADMIN. JUDGE YODER: There is no

16   agreement.   There is no agreement until it's

17   signed by the Administrator.

18   MR. BELL: I'm not sure that there

19   has to be separate consideration for every --

20   every term --

21   ADMIN. JUDGE YODER: There isn't.

22   I'm not talking about separate consideration.

1   You're talking about a 30-day option. What's

2   the consideration for that 30-day option?

3   Well, let me help you, Mr. Bell. I'm not at

4   all sure there is any. And there is, however,

5   a provision in the rules that says it may not

6   be withdrawn for a period of 30 days. That's

7   386.2283. But that's a regulation. That's

8   not consideration. So all I'm suggesting is

9   that there may be a problem there.

10   So, in any event, Transland then

11   got in touch with you and said that they

12   didn't want to do the settlement. Is that

13   right?

14   MR. BELL: Transland did not;

15   Transland's attorney did, on November 25th.

16   ADMIN. JUDGE YODER: That's what I

17   mean.

18   MR. BELL: Yes. I just wanted to

19   be clear that I've never spoken to an employee

20   or officer of Transland.

21   ADMIN. JUDGE YODER: Yes. Right.

22   So was the Field Administrator told that when

1   you learned it?

2   MR. BELL: Told of what?

3   ADMIN. JUDGE YODER: Told that the

4   representative counsel for Transland said they

5   no longer wanted to go through with the

6   agreement?

7   MR. BELL: Are you asking me about

8   a conversation between me and my client?

9   ADMIN. JUDGE YODER: I'm asking

10   you whether you communicated that information

11   to the Field Administrator.

12   MR. BELL: Well, I'm not sure how

13   I can answer that without waiving an

14   attorney/client privilege. But --

15   ADMIN. JUDGE YODER: Do you think

16   that's an attorney/client privilege matter?

17   MR. BELL: I -- if I'm giving

18   advice to my client, I think that it is.

19   ADMIN. JUDGE YODER: So, if I ask

20   you other things about your communications

21   with the Field Administrator, with respect to

22   this settlement, your response is going to be

1   the same?

2   MR. BELL: Well, it's -- I'm not

3   sure of the relevance of my privileged

4   communications with my client.

5   ADMIN. JUDGE YODER: Well, you're

6   characterizing them as privileged. I'm

7   inquiring as to the nature of your

8   participation in the preparation of this

9   settlement.

10   MR. BELL: I have no -- I had no

11   preference -- I had no involvement in the

12   preparation of the settlement agreement. I

13   didn't even know that it had been sent. I

14   didn't know that it had been signed and I

15   didn't know that it had been signed by the

16   Field Administrator until I received it on

17   December 3rd, from the Field Administrator,

18   directly.

19   ADMIN. JUDGE YODER: Did you know

20   that it was being negotiated?

21   MR. BELL: I knew that it was

22   being negotiated.

1   ADMIN. JUDGE YODER: Were you, in

2 fact, asked to authorize such negotiations as

3 suggested in the petition?

4   MR. BELL: I was asked by my

5 client if he could speak to Transland. Yes.

6   ADMIN. JUDGE YODER: And did your

7 client then consult with you about what should

8 be in that settlement agreement?

9   MR. BELL: No, my client did not.

10   ADMIN. JUDGE YODER: And you

11 didn't tell them what should be in it?

12   MR. BELL: No, sir. I did not.

13   ADMIN. JUDGE YODER: Or what the

14 settlement level should be?

15   MR. BELL: No, sir. I did not.

16   ADMIN. JUDGE YODER: All right.

17 Well, I asked those questions, Mr. Bell, only

18 because there are references in here

19 suggesting improper conduct.   And your

20 responses were that you did not communicate

21 directly with the Respondent, which left open

22 a wide door with respect to whether you

1   communicated indirectly with the Respondent.

2   MR. BELL: I've had no -- other

3   than my client calling me and saying Transland

4   has called --

5   ADMIN. JUDGE YODER: Right.

6   MR.   BELL: --   the   Field

7   Administrator directly and wants to settle

8   this case, and may I talk to him.

9   ADMIN. JUDGE YODER: Yes.

10   MR. BELL: And, other than that, I

11   had   no   knowledge   that   anything   had   ever

12   happened after that, until I received the call

13   from Mr. McMahon on the 25th, that Transland

14   was no longer interested in settlement. And

15   then, the next thing that I heard about the

16   settlement was -- I received from the Field

17   Administrator directly, on December 3rd, a

18   copy of a fully executed settlement agreement.

19   ADMIN. JUDGE YODER: Okay. I just

20   wanted to put on the table and make sure you

21   were aware of the Disciplinary Rule 7-014A1 of

22   the former Model Code, which said that you

1 cannot communicate or cause another to

2 communicate on the subject of the

3 representation of a party he knows to be

4 represented by a lawyer in that matter.

5   MR. BELL: I'm well aware of the

6 Disciplinary Rules that are applicable to me.

7   ADMIN. JUDGE YODER: Well, I just

8 mentioned that one because it was in the

9 former Model Code and the current rule states

10 that there was not intention to substantively

11 change that previous rule. So that the bar

12 runs not just to direct communication, but to

13 causing another to communicate, which can be

14 a complicated question, in and of itself.

15   MR. BELL: And I think there's

16 also -- I'm sorry?

17   ADMIN. JUDGE YODER: You were

18 saying?

19   MR. BELL: I think that there was

20 also an exception where parties may

21 communicate directly with each other.

22   ADMIN. JUDGE YODER: Well, that's

1   not an exception. That's a different

2   modality. Parties can communicate with each

3   other. But the question is whether a lawyer

4   can cause another to communicate. And that

5   would be the issue, if there were an issue.

6   And, as I say, I just wanted to alert you to

7   that question.

8   MR. BELL: Thank you.

9   ADMIN. JUDGE YODER: Now, with

10   respect to the agreement, itself, Mr. McMahon,

11   I gather the suggestion is that your Safety

12   Director was not authorized to negotiate this

13   settlement?

14   MR. McMAHON: That's correct, Your

15   Honor.

16   ADMIN. JUDGE YODER: I have a lot

17   of difficulty with that. Among the reasons is

18   that the previous settlement agreement was

19   negotiated with the Safety Director and

20   executed by the Safety Director. And then, at

21   one point, I think Mr. Walker actually told

22   Mr. Lucht -- that's L-U-C-H-T -- to go ahead

1   with the settlement. Isn't that correct?

2   MR. McMAHON: Your Honor, this is

3   McMahon. The -- in the earlier case, where

4   the Safety Director, who had been at Transland

5   for well over a year, had negotiated a

6   settlement, they were not represented by

7   counsel. I did not represent them. I was not

8   aware that that case existed. In this case,

9   they were represented by counsel, me and Mr.

10   Sachs, for a number of years. The -- Mike

11   Walker, the President of Transland, has made

12   clear that Transland has had a severe

13   financial burden because of the cost of the

14   representation by counsel in this case. When

15   I talked to him -- I got an e-mail that was

16   attached to our opposition or petition to

17   declare the settlement void -- I got an e-mail

18   from Mr. Walker advising that Mr. Lucht had

19   negotiated a reduction of the penalty. He did

20   not know what all was involved, but the -- in

21   the conditions, and so on. He had not seen

22   the settlement agreement. He did not know

1   that a written settlement agreement had been

2   signed, or even existed.   All he understood

3   was that Mr. Lucht had negotiated a reduction

4   of the amount of the payment and the reduced

5   amount was to be paid over a period of time.

6   When I spoke -- he sent me an e-

7   mail. When I got that e-mail, Mr. Sachs and

8   I got on the phone with Mr. Walker and Mr.

9   Lucht. And I pointed out to Mr. Walker what

10 was in that -- well, I'm not sure if I, at

11 that time, had it. But, in any case, I said

12 this is the -- you know, this is the end of

13 this case. You have paid us a lot of money to

14 bring us to where we are now, which involves

15 a lot of discovery, drafting of briefs, etc.,

16 and, you know, this is the end. Conceivably,

17 if you do nothing, the Chief Administrative

18 Law Judge could render a decision in your

19 favor. And, at that point, you've won. It's

20 over.   And he indicated he thought the

21 Government would appeal. And I said well that

22 depends on what the -- what the decision is.

1   And then they'll have to discuss it, if it's

2   contrary to the position of the Claimant. And

3   that, even if the Government were inclined to

4   appeal,   you   could   negotiate   a   better

5   settlement; you'd be in a stronger position.

6   And they should not have spoken to you.

7   You're represented by counsel. This is like

8   the   police   calling   somebody   who's   been

9   indicted, who's represented by an attorney.

10   ADMIN. JUDGE YODER: Mr. McMahon,

11   let me interrupt you there. You don't have

12   any question that clients can talk to each

13   other,   despite   the   fact   that   they're

14   represented by counsel, do you?

15   MR. McMAHON: No. No.

16   ADMIN. JUDGE YODER: Okay. So it

17   would be a bit of an overstatement to say that

18   they shouldn't have talked to one another.

19   MR. McMAHON: Oh. However, at the

20   point where they realized -- that the Claimant

21   realized that this party was represented by

22   counsel, and consulted with their own attorney

1 to see if it was appropriate or permitted for

2 them to negotiate a settlement of a matter

3 that was under litigation, I think that their

4 attorney should have said no, you may not. We

5 have to bring in their attorneys.

6   ADMIN. JUDGE YODER: You're

7 suggesting that that may run a foul of the

8 Disciplinary Rule with respect to causing

9 another to communicate?

10   MR. McMAHON: That's exactly what

11 I mean, Your Honor. I think that did cause

12 it.

13   ADMIN. JUDGE YODER: But you

14 didn't say that in your filing. That's why I

15 was wondering whether that's what you were

16 suggesting.

17   MR. McMAHON: Yes, sir. It was.

18   ADMIN. JUDGE YODER: Which still

19 leaves me wondering why one should conclude

20 that Mr. Walker's knowledge of the agreement

21 was relevant to whether the settlement was

22 effective and whether Mr. Lucht had the

1 authority to go ahead. If Mr. Lucht had the

2 authority to go ahead, it doesn't matter

3 whether Mr. Walker knew anything about it.

4   MR. McMAHON: The authority to go

5 ahead, Your Honor, was to go ahead with what

6 Mr. Lucht told Mr. Walker he was inclined to

7 go ahead with. And that was to get an

8 agreement to reduce the amount of the

9 penalties.

10   ADMIN. JUDGE YODER: What, if

11 anything, is, in your mind, unusual about the

12 terms of this settlement agreement, as agreed.

13 I mean, you've done lots of these, have you

14 not?

15   MR. McMAHON: No. No, I haven't,

16 Your Honor.

17   ADMIN. JUDGE YODER: Oh. Okay.

18 I'm sorry. I'm projecting my own familiarity

19 with them. Are you not familiar with the

20 general form that these settlement agreements

21 take?

22   MR. McMAHON: Well, they're in the

1   Code of Federal Regulations. That's why it --

2   it recites that it was jointly drafted. I

3   don't see how a Claimant and a Respondent can

4   jointly draft something that's in the Code of

5   Federal Regulations.   That's bogus on its

6   face.

7   ADMIN. JUDGE YODER: I'm sorry.

8   Are you suggesting that the entire settlement

9   agreement is in the Code of Federal

10   Regulations?

11   MR. McMAHON: I believe that

12   everything that's in that is in there.

13   ADMIN. JUDGE YODER: Is that your

14   position, Mr. Bell?

15   MR. BELL: This is John Bell.   I

16   don't believe that the text of the settlement

17   agreement is in the Code of Federal

18   Regulations. 386.22 has some required terms

19   in it, but I don't think that the actual text

20   is anywhere set forth in the regulations.

21   ADMIN. JUDGE YODER: Okay. Thank

22   you.

1   MR. McMAHON: I am sorry, Your

2   Honor.   This is McMahon again.   There

3   certainly are parts that is not in there, like

4   the amount of reduction and so on.

5   ADMIN. JUDGE YODER: Well, I'm

6   just not sure that, in general, the terms are

7   in there. For instance, one of the terms is

8   how long you have to avoid any finding of

9   violation.   And, in the previous settlement

10   agreement, that term was two years.   In this

11   settlement agreement, it's three years.

12   You're familiar with the previous

13   settlement agreement, are you not, Mr.

14   McMahon?

15   MR. McMAHON: I'll take your work

16   for it, Your Honor.   I don't have any

17   recollection of it.

18   ADMIN. JUDGE YODER: Well, you got

19   Mr. Bell's filing in response to your

20   petition?

21   MR. McMAHON: I did. But I didn't

22   look at that earlier settlement agreement.

1   ADMIN. JUDGE YODER: That attaches

2   a copy of the earlier settlement agreement.

3   MR. McMAHON: It did.

4   ADMIN. JUDGE YODER: You might

5   want to take a look at that.

6   MR. McMAHON: Okay.

7   ADMIN. JUDGE YODER: It might be

8   instructive, in terms of what is normal with

9   respect to such settlement agreements.

10   MR. McMAHON: All right. But,

11   Your Honor, if this -- Mr. Walker is very

12   strong in his opinion that Mr. Lucht was not

13   authorized when he was told to go ahead, to

14   agree that future compliance reviews would not

15   result in any charges of violations of Section

16   395.8(e), and that, if any such violations

17   occurred or were discovered on a compliance

18   review, that the entire $50,000 would be due

19   and payable immediately, and failure to pay

20   within 90 days would result in loss of

21   authority to operate in interstate commerce.

22   He would not authorize that. And here is the

1   Safety Director who's only been working there

2   for two days.

3   ADMIN.   JUDGE   YODER:

4   Unfortunately, Mr. McMahon, I think you'll

5   find that term is also in the previous

6   settlement.

7   MR. McMAHON: And Mr. Walker

8   didn't read that either.

9   MR. McMAHON: Mr. McMahon, you

10   need to wait until I'm finished.

11   MR. McMAHON: I'm sorry, Your

12   Honor.

13   ADMIN. JUDGE YODER: And that was

14   signed by a Safety Director who, apparently,

15   had been there for quite some time.

16   MR. McMAHON: He had been there a

17   while.   Stan Tastric.

18   ADMIN. JUDGE YODER: Well, in any

19   event, there's no contention that he didn't

20   have authority to sign that.

21   MR. McMAHON: That's right.

22   ADMIN. JUDGE YODER: Or that Mr.

1   Walker disapproved of that agreement.

2   MR. McMAHON: That's right.

3   ADMIN. JUDGE YODER: It required

4   Transland to avoid violations for two years.

5   MR. McMAHON: But Mr. Walker was

6   not familiar with the terms of that settlement

7   agreement or the one we're talking about here.

8   In fact, he didn't read the one we're talking

9   about here until I told him to, while we were

10   on the telephone, in December.

11   ADMIN. JUDGE YODER: I understand.

12   While you may regret that, and you may wish

13   that your client was more familiar with things

14   that he had authorized his people to do, it

15   appears that he authorized Luchts to go ahead

16   with this. Now, let's just look at some of

17   the things we're talking about here. One of

18   the things you are concerned about is whether

19   the agreement says may or will, with respect

20   to what will happen if there's a default.

21   That is a question that we would normally fix

22   in the course of approving a settlement

1   agreement.   So that would not be something

2   that we would have that much difficulty with.

3   There are some things, however,

4   that do cause me concerns. And one of them is

5   that, apparently, the FMCSA rules, with

6   respect to the use of GPS data changed

7   basically two days after this agreement was

8   reached. Is that right, Mr. Bell?

9   MR. BELL: I'm not sure of the

10 exact date that they were published in the

11 Federal Register, but it is within that, yes.

12   ADMIN. JUDGE YODER: November 18,

13 2008.

14   MR. BELL: Then that would be two

15 days before this agreement was signed that it

16 was published.

17   ADMIN. JUDGE YODER: Before it was

18 signed, but after it was agreed to.

19   MR. BELL: I don't believe that

20 the telephone conversations even started until

21 November 19th.

22   ADMIN. JUDGE YODER: Okay. So, in

1   any event, there was a change in the

2   regulatory environment, by reason of that

3   notice in the <u>Federal Register</u>.   Is that

4   right?

5   MR. BELL: The -- yes, the 1997

6   policy memo was rescinded.   Yes.

7   ADMIN. JUDGE YODER: Right.   And

8   the consequence of that was the GPS dated --

9   could now be used by FMCSA representatives in

10 all of its compliance reviews.   Is that

11 basically what that amounted to?

12   MR.   BELL: Well, there were

13 certain restrictions in the 1997 policy

14 statement that --

15   ADMIN. JUDGE YODER: Right.

16   MR.   BELL: -- required certain

17 levels of approval before requesting GPS data

18 from carriers.   And so that policy statement

19 has been rescinded.

20   ADMIN.   JUDGE   YODER: I   think

21 that's a yes.

22   MR. BELL: That was as close to a

1   yes as I guess I can get.

2   ADMIN. JUDGE YODER: Okay. Good.

3   So it would appear that there may have been a

4   substantial   change   in   the   regulatory

5   environment, either at the time this agreement

6   was entered or before it was signed or after

7   it was signed. In any event, right around the

8   same time. So, that is one concern I have

9   about the agreement.

10   I must say, I do have a concern

11   about the fact that Counsel for Transland was

12   not advised that these negotiations were going

13   on, which meant that Counsel for FMCSA knew

14   they were going on, but Counsel for Transland

15   did not know they were going on. Now,

16   admittedly, Counsel for FMCSA may not have

17   known that Counsel for Transland didn't know,

18   since Mr. Bell was not privy to communications

19   between Transland and Mr. McMahon. But that

20   is a concern.

21   There's a third concern. And that

22   is that the settlement agreement purports to

1   say that it's final when it's executed by the

2   Field Administrator.   And that is clearly

3   something that would not be approved by me.

4   Because it just isn't true.   And so that

5   obviously would have to be amended.

6   Now, we have pending in this

7   matter cross motions for summary judgment.

8   And there's been no decision on those motions.

9   And, assuming this matter is settled, then

10   there wouldn't necessarily need to be a

11   decision on these motions.   I did, however,

12   want to clarify what the positions of the

13   parties, with respect to those motions and the

14   matters at issue in these proceedings.   I'm

15   sure both parties recognize that such a motion

16   could only be granted if there are no disputed

17   issues of fact.   And, in looking through the

18   papers and focusing on what the parties are

19   saying in them and some of the things they

20   aren't saying in them, I wonder whether that

21   is a realistic possibility.

22   If   the   motions   don't   end   the

1   matter, then the matter will go to trial.

2   And, based on the communications that we have

3   from Mr. Walker, I would gather that that is

4   something that Transland really doesn't want

5   to have happen. Does someone have a squeaky

6   chair or is this the "Inner Sanctum", or what?

7   MR. McMAHON: I am afraid I have a

8   squeaky chair, Your Honor. McMahon.

9   ADMIN. JUDGE YODER: All right.

10   Can we agree, Mr. Bell, that if this goes to

11   trial the central question is going to be

12   whether Transland knew or should have known of

13   these alleged violations by the Transland

14   employees?

15   MR. BELL: I believe that is one

16   of the central questions. But I also believe

17   that Transland, in its reply, has denied that

18   the violations occurred at all. So I guess

19   that would be, for each of the 118 counts that

20   --

21   ADMIN. JUDGE YODER: Right.

22   MR. BELL: -- that the Field

1   Administrator would be required to put on a

2   case for that too.

3   ADMIN. JUDGE YODER: So that would

4   have to be proved?

5   MR. BELL: Yes, sir.

6   ADMIN. JUDGE YODER: Okay. But,

7   with respect to whether those violations

8   occurred, the test would be whether Transland

9   knew or should have known that they occurred.

10 Is that right?

11   MR. BELL: That is true.

12   ADMIN. JUDGE YODER: Okay. And,

13 the reason I asked that is that it is not

14 always clear to me in the cross motions that

15 that issue is joined. In other words, the

16 question of what constitutes reasonable

17 behavior by Transland, with respect to

18 gathering knowledge, does not appear to me to

19 have been clearly addressed in the cross

20 motion for summary judgment. Did I miss

21 something?

22   MR. BELL: If you'll bear with me

1   for a moment, Your Honor.

2   ADMIN.   JUDGE   YODER: Yes,

3   certainly.

4   MR. BELL: I will go through and

5   see if --

6   ADMIN. JUDGE YODER: I would take

7   it that -- while you're looking -- I would

8   take it that one of the questions there is

9   whether Transland knew or should have known

10   the information that Claimant garnered from

11   the GPS statement.

12   MR. BELL: I think that is -- I'm

13   not sure that the motion did -- did explain it

14   as well as it could have.   But I think that

15   that is the -- all the violations were

16   discovered using the Respondent's phone

17   records.   And so, based on that, Respondent

18   knew or should have known -- Transland knew,

19   or should have known, just based on a review

20   of its own records, that these violations

21   occurred.

22   ADMIN. JUDGE YODER: When you say

1   on records, you include the GPS data?

2   MR. BELL: That -- yes, Your

3   Honor.   I do.

4   ADMIN. JUDGE YODER: Okay.   And

5   you aren't contending that there was some

6   obligation on Transland to, as a matter of

7   course, use GPS data?

8   MR. BELL: No, Your Honor.

9   ADMIN. JUDGE YODER: Okay.   That

10   brings me to a number of other questions.

11   Because I'm wondering what violations remain

12   in this proceeding if you don't have the GPS

13   data. Are there any violations you can prove

14   without the GPS data?

15   MR. BELL: All of the violations

16   are based on the GPS data.

17   ADMIN. JUDGE YODER: Okay.   So the

18   answer is none?   There are no specific

19   violations relating to the fatal accident by

20   who was it, DeJonge?

21   MR. BELL: James DeJonge.

22   ADMIN. JUDGE YODER: D-E-J-O-N-G-

E.

MR. BELL: All of the violations in this are 395.8(3) violation of false logs. I don't know whether one of them had to do with that particular day. I know that there was evidence gathered showing that Mr. DeJonge was in violation of that, but I don't know if it was one of the charged violations or whether it was part of the extent.

ADMIN. JUDGE YODER: Now, I do gather from the cross motion that one of the reasons given for checking the GPS data was the agreement between the fueling statements and the RODS.

MR. BELL: Well, I think it's -- and, again, this would probably -- might be better answered by Mr. Lantz -- L-A-N-T-z -- the Safety Investigator's --

ADMIN. JUDGE YODER: Well, unfortunately, you're the guy on the spot here.

MR. BELL: I understand that.

1   ADMIN. JUDGE YODER: You're the

2 only one I have, so you get to answer.

3   MR. BELL: And I will. His --

4 what his affidavit says, if I recall

5 correctly, is that he -- his initial review

6 was of a random driver. He pulled 30 -- 30

7 days of records for a random driver. Each one

8 of the records lined up exactly with the

9 fueling statements. And he found that to be

10 unusual.

11   ADMIN. JUDGE YODER: Right.

12   MR. BELL: His next step -- his

13 next step was to review Mr. DeJonge's record

14 for the time period surrounding the fatal

15 accident. And, as part of that -- in part of

16 that review of Mr. DeJonge's records, he

17 requested the GPS records for Mr. DeJonge,

18 which were provided by Transland, without a

19 subpoena.

20   ADMIN. JUDGE YODER: Right.

21   MR. BELL: He reviewed the records

22 for Mr. DeJonge for that 30-day -- I believe

1   it was a 30-day period. The accident, I

2   think, was on April 7th, and he reviewed from

3   March 15th to April 15th. And he reviewed all

4   of the records that were given to him, with

5   respect to Mr. DeJonge, including the GPS

6   records, and found that Mr. DeJonge was in

7   violation for 18 out of 25 days.

8   ADMIN. JUDGE YODER: Okay. Now,

9   since Mr. Lantz couldn't come up with this

10   without reviewing the GPS data, how is it that

11   you content that Transland should have come up

12   with it?

13   MR. BELL: Well, Transland -- it's

14   -- it had access to these records as well,

15   whether or not it -- it can't excuse itself

16   from responsibility by saying that it didn't

17   look at these records. It had access to these

18   records. They were records pulled from its

19   computer systems and records pulled from data

20   bases and GPS units that it owned. And for it

21   to just ignore what is available to it,

22   becomes, I think, should have known.

1   ADMIN. JUDGE YODER: Do you have

2   any authority for that?

3   MR. BELL: Other than?

4   ADMIN. JUDGE YODER: What I hear

5   you saying, Mr. Bell, is that a carrier has an

6   obligation to check -- I don't know how much

7   -- but check GPS data to check the validity of

8   RODS.   Is that what I'm hearing you say?

9   MR. BELL: GPS data or GPS records

10   are supporting documents.   And so, yes, they

11   do have an obligation to insure the validity

12   of the records of duty status (RODS).

13   ADMIN. JUDGE YODER: Where do you

14   find that obligation?

15   MR. BELL: That they have a duty

16   to   --   in   395-8(e),   that   they   have   an

17   obligation   to   insure   that   the   RODS   are

18   accurate.

19   ADMIN. JUDGE YODER: Right.   But,

20   until this recent change in the regulations,

21   there was no general recognition that GPS data

22   should be used in checking the RODS.   Right?

1   MR. BELL: Not specifically to use

2   GPS. But they do -- a carrier does have an

3   obligation to make sure that the records

4   aren't false.   If they have access to data

5   that could -- that bears on that, then they

6   have an obligation to check that data.

7   ADMIN. JUDGE YODER: Well, it's my

8   recollection that, at one point, someone on

9   behalf of the Field Administrator contends

10   that Transland used GPS data to randomly check

11   RODS.   Is that right?

12   MR. BELL: My understanding is

13   that the Safety Investigator, Lantz, was told

14   that by a Safety Investigator -- or sorry --

15   a Safety Director for Transland, named Al

16   Mobley, M-O-B-L-E-Y.   But that this Field

17   Administrator -- at this point, the Field

18   Administrator doesn't need -- that's not a

19   material fact to this, because the data -- I'm

20   sorry, the GPS data was properly requested by

21   Safety Investigator Lucht, without it having

22   to be -- one of the ways to get GPS data,

1 under the 1997 memorandum was, if the carrier

2 used it as part of a random -- as a way of

3 randomly checking. But another way was if

4 there were high accident rates and there were

5 a couple of other exceptions where it -- where

6 GPS data could be requested. And that's what

7 happened here, not necessarily based on Mr.

8 Mobley, but that was one of the contentions.

9   ADMIN. JUDGE YODER: I take it

10 then that you would not seek to prove that

11 Transland used GPS to randomly check RODS?

12   MR. BELL: I don't think that -- I

13 don't think that the Field Administrator needs

14 to prove it because I think that the Safety --

15   ADMIN. JUDGE YODER: That's not

16 what I asked you, Mr. Bell.

17   MR. BELL: Right.

18   ADMIN. JUDGE YODER: As you will

19 recall. My question was whether that was

20 something you would seek to prove. I gather

21 you're telling me no.

22   MR. BELL: It is not something, at

1   this point, that I would seek to prove. And,

2   obviously, it's --

3   ADMIN. JUDGE YODER: See. One of

4   the problems I have with the response that you

5   just gave me was, it was -- your response was

6   an effort to justify the subpoena. My inquiry

7   is not directed at whether the subpoena was

8   justified. My inquiry is directed at what is

9   information that Transland should have known.

10   And what I'm trying to identify is the

11   position of the Claimant, with respect to the

12   conduct that Transland should have engaged in,

13   in order to have known what you learned from

14   the GPS data. I think that's what you're

15   going to have to prove.

16   MR. SULLIVAN: I understand. And

17   I think what Transland is required to know, or

18   should have known here, is it is required to

19   look through data that is available to it --

20   its supporting documents that are available to

21   it, including the GPS data, because it had GPS

22   data -- it had access to GPS data.

1   ADMIN. JUDGE YODER: Okay. Your

2 position then is that Transland has an

3 obligation to check RODS against GPS data?

4   MR. BELL: Because it was a --

5 because it is a supporting document that it

6 maintained. Yes.

7   ADMIN. JUDGE YODER: That -- okay.

8 Did you have any authority for that?

9   MR. BELL: Not at this time.

10   ADMIN. JUDGE YODER: Well, if

11 that's your position, then that's something

12 you might well want to brief.

13   MR. BELL: Other than -- yes, sir.

14 I will. But, other than it being --

15   ADMIN. JUDGE YODER: Do you

16 understand what I'm saying? My question was

17 somewhat more limited than that, initially.

18 My question was whether it was the

19 Administrator's position -- the Field

20 Administrator's position that, because of the

21 things that alerted Lantz, should Transland

22 also have been alerted to check the GPS data?

1 Do you understand what I'm asking? Your first

2 position was Transland should check the GPS

3 data because it's there. I'm not aware of any

4 authority for that position. And that's

5 something you can give me if you have it.

6   Indeed, it has been suggested

7 that, prior to this recent announcement, it

8 was not incumbent upon carriers to check GPS

9 data to verify RODS. And, if you are going to

10 run this case on that proposition, and if you

11 can't sustain that proposition, you lose.

12 Then that gives us a certain kind of case. Do

13 you understand what I'm saying?

14   MR. BELL: I do understand.

15   ADMIN. JUDGE YODER: And the

16 question I was asking is whether something

17 more limited than that, such as an obligation

18 to check it for the same reasons that Lantz

19 checked it would be the basis for the Field

20 Administrator's position. And what I've heard

21 so far is the answer is no. That's why he

22 checked it and that's why the subpoena was

1   okay, but that's not what you're giving as the

2   reason for Transland -- should have known.

3   Are you contending that Transland

4   actually knew?

5   MR. BELL: I'm contending that

6   Transland should have known, based on the fact

7   that it maintained these documents that would

8   have told it, had it looked at the documents

9   that it maintained.

10   ADMIN. JUDGE YODER: That sounds

11 very much like a no.

12   MR. BELL: No. I don't -- I don't

13 think that there's any evidence, at this

14 point, that Transland actually knew.

15   ADMIN. JUDGE YODER: Okay.   So

16 then the question for trial becomes whether

17 they should have known.   And the test for

18 should have known is what I'm trying to get

19 you to focus on.   And what I have heard you

20 say, so far, is the test for should have known

21 is because the GPS documents existed, they

22 should have been checked, period. And I think

that's something I'm going to need you to

address, if this case goes forward. Because

this whole case is going to be tried on

whether they should have known. And I'm not

aware of any authority out there, spelling out

the parameters of that. So let's press on and

see if we can explore -- was Transland ever

asked to check the GPS data?

MR. BELL: I'm not -- during the

compliance review?

ADMIN. JUDGE YODER: Ever, in any

way?

MR. BELL: I don't know that they

were. I don't think so.

ADMIN. JUDGE YODER: Okay. So

that's -- if you rely on the GPS data, you may

have to prove its accuracy.

MR. BELL: I think that we can do

that. I think that it can also be something

that there can be notice taken of -- the

accuracy of GPS data. But we would certainly

-- the Field Administrator would certainly be

1   able to prove that through testimony.

2   ADMIN. JUDGE YODER: You could

3   prove the accuracy of Transland's GPS data?

4   MR. BELL: We could.

5   ADMIN. JUDGE YODER: And that's

6   what you would do?

7   MR. BELL: We can prove that the

8   records were obtained from Transland -- that

9   these GPS records -- and we can prove that GPS

10   records are generally accurate.

11   ADMIN. JUDGE YODER: You know

12   that's not what I asked you.

13   MR. BELL: Whether we can prove

14   that Transland's actually GPS records were

15   accurate?

16   ADMIN. JUDGE YODER: Yes, sir.

17   MR. BELL: I don't think that

18   we're required to prove that Transland's GPS

19   records were accurate.

20   ADMIN. JUDGE YODER: How do you --

21   MR. BELL: That they're actual --

22   ADMIN. JUDGE YODER: How do you

1   prove the case if you can't prove that the GPS

2   records were accurate?

3   MR. BELL: Well, I guess they --

4   Transland is required to -- Transland provided

5   the documents to us --

6   ADMIN. JUDGE YODER: At your

7   request.

8   MR. BELL: -- at our -- at the

9   request of the Field Administrator.

10   ADMIN. JUDGE YODER: Yes.

11   MR. BELL: And they are supporting

12   documents for Records of Duty Status -- the

13   GPS records.

14   ADMIN. JUDGE YODER: Well, they

15   are whatever they are.

16   MR. BELL: They are.

17   ADMIN. JUDGE YODER: And my

18   question is how do you prove their accuracy?

19   Or do you?

20   MR. BELL: I don't think that we

21   have to prove that every single line on those

22   GPS records is accurate.

1   ADMIN. JUDGE YODER: Well, how

2   about the lines that you want to use to prove

3   the violations?

4   MR. BELL: I don't -- I don't

5   think that we have to prove that. We obtained

6   them from the files -- or from Transland,

7   itself. If Transland has given us misleading

8   documents, their misleading documents prove a

9   violation. If they -- at this point, it's

10   very difficult, I think, for Transland to come

11   back and say that the documents that they gave

12   us are inaccurate -- the supporting documents.

13   ADMIN. JUDGE YODER: Well, they

14   aren't the ones who are saying they're

15   inaccurate. I'm the one who's asking you how

16   you're going to prove they are accurate.

17   MR. BELL: And I don't -- I don't

18   think that the Field Administrator has to

19   prove that they're accurate.

20   ADMIN. JUDGE YODER: Why should I

21   rely on them, if you don't prove they're

22   accurate?

1   MR. BELL: They were submitted to

2   the -- by Transland --

3   ADMIN. JUDGE YODER: Because they

4   were kept by Transland.

5   MR. BELL: -- as a support -- as a

6   supporting document.

7   ADMIN. JUDGE YODER: Well, as

8   whatever they were, they were kept by

9   Transland. They were not required to be kept,

10   is that right?

11   MR. BELL: No. I don't think they

12   were required to be kept.

13   ADMIN. JUDGE YODER: They didn't

14   require -- no one required that they have GPS

15   data. Is that right?

16   MR. BELL: Well, they're required

17   to keep all supporting documents for six

18   months.

19   ADMIN. JUDGE YODER: No. No. No.

20   No. No. No. No one required them to have

21   any GPS data, period. Is that correct?

22   MR. BELL: No one requires them to

1 have any GPS data. That is correct.

2   ADMIN. JUDGE YODER: Okay. So

3 they have this GPS data. They don't know

4 whether it's accurate. You don't know whether

5 it's accurate. Who's going to prove that it's

6 accurate? You're the one who's supposed to

7 prove the violations. You're going to prove

8 it with GPS data. How are you going to prove

9 it with GPS data, without proving the accuracy

10 of the GPS data?

11   MR. BELL: What I can prove is

12 that GPS data -- I can prove that GPS data is

13 -- conforms to a standard and that it is --

14 that is relied upon regularly as being

15 accurate.

16   ADMIN. JUDGE YODER: Yes. It's

17 something you might want to reflect on, Mr.

18 Bell. I can't tell that you have. And, if

19 this case goes to trial, GPS data is the heart

20 of your case. And, without the GPS data, you

21 have said you have no violations. So the

22 question is how do you prove the accuracy of

1   the GPS data. All you can prove is that -- so

2   far, all you've told me you can prove is that

3   you got it from Transland. Okay? All right.

4   Now, Mr. McMahon?

5   MR. McMAHON: Yes, sir.

6   ADMIN. JUDGE YODER: Are you still

7   there?

8   MR. McMAHON: I am.

9   ADMIN. JUDGE YODER: You haven't

10   lost interest?

11   MR. McMAHON: No. No. I -- I had

12   a few things to say, but I knew better than to

13   interrupt.

14   ADMIN. JUDGE YODER: You'll get a

15   chance. Did Transland use GPS data to

16   randomly check its RODS?

17   MR. McMAHON: There were no

18   documents containing GPS data, Your Honor?

19   ADMIN. JUDGE YODER: Pardon?

20   MR. McMAHON: The documents that

21   were used by -- by the investigator in the

22   compliance review were created by Transland's

1   IT manager, at the request of this --

2   ADMIN. JUDGE YODER: Oh, I see.

3   You wanted to answer a different question.

4   MR. McMAHON: That's it.

5   ADMIN. JUDGE YODER: But you heard

6   the question I asked. Do you want to answer

7   the question I asked?

8   MR. McMAHON: Were they required

9   to use GPS --

10   ADMIN. JUDGE YODER: No. That's

11   not what I asked.

12   MR. McMAHON: I'm sorry.

13   ADMIN. JUDGE YODER: Did Transland

14   use GPS data to check RODS?

15   MR. McMAHON: No, sir.

16   ADMIN. JUDGE YODER: In any way,

17   ever?

18   MR. McMAHON: No, sir. No, sir.

19   ADMIN. JUDGE YODER: Okay. So

20   they didn't do it randomly; they didn't do it

21   full time; they didn't do it, period?

22   MR. McMAHON: Correct, sir.

1   ADMIN. JUDGE YODER: Can you tell

2   me why?

3   MR. McMAHON: Because it was so

4   difficult -- they had no reason to. And,

5   according to the affidavit of the IT manager,

6   it was very difficult to -- to create a record

7   showing the GPS data.

8   ADMIN. JUDGE YODER: Would you

9   agree that it's unusual to have RODS and

10   fueling statements agree 100 percent?

11   MR. McMAHON: I -- it's not at all

12   odd for RODS and fueling statements to agree.

13   In fact, Your Honor, I believe you had -- well

14   you had three Swift cases. In one of those

15   Swift cases, the false logs allegations were

16   all based on discrepancies -- well, with

17   supporting documents. And there were no

18   discrepancies with fueling statements. And

19   that was because, after the first compliance

20   review, Swift told -- decided that they were

21   going to --

22   ADMIN. JUDGE YODER: They may have

1   all agreed.

2   MR. McMAHON: Pardon me? They may

3   have all agreed because they knew that the

4   investigators were going to use fueling

5   statements to audit RODS. So they told the

6   drivers -- they caught the drivers falsifying

7   their logs on the basis of fuel statements.

8   They sanctioned the drivers. So the drivers

9   caught on pretty quickly and they logged fuel

10   stops accurately.

11   ADMIN. JUDGE YODER: Okay. What I

12   just heard you tell me was no, it's not

13   unusual to have them agree. But where they

14   do, it's probably a fraud.

15   MR. McMAHON: It's not -- not

16   fraudulent to -- to have them agree. It's

17   purpose, though, is to avoid being charged for

18   having a false log, because it's not false.

19   ADMIN. JUDGE YODER: Well, maybe

20   we will disagree as to what a fraud is. But

21   if you jury-rigged your fuel statements to

22   agree with your RODS, just so there won't be

1 a disagreement, somewhere --

2   MR. McMAHON: No, it's the other

3 way around, Your Honor.   You're keeping

4 accurate logs --

5   ADMIN. JUDGE YODER: Yes.

6   MR. McMAHON: -- so that the

7 accurate log reflects the time and place where

8 you fueled.

9   ADMIN. JUDGE YODER: Okay. That's

10 not what I heard you were saying about what

11 happened in Swift.

12   MR. McMAHON: Oh, no.   That is

13 what happened, though.

14   ADMIN. JUDGE YODER: Okay.   So

15 you're saying that they really agreed because

16 they really agreed?

17   MR. McMAHON: Right. Right. The

18 drivers caught on.

19   ADMIN. JUDGE YODER: Okay.

20   MR. McMAHON: Yes.   Don't fake

21 misstatements on your logs as far as fueling

22 is concerned.

1   ADMIN. JUDGE YODER: Okay. Make

2   sure that everything is accurate?

3   MR. McMAHON: As far as fueling

4   was concerned, yes.

5   ADMIN. JUDGE YODER: Okay. So

6   you're suggesting that it is common to have

7   them agree, because people want to make sure

8   they agree?

9   MR. McMAHON: If they know that's

10 what's being used to audit their logs, yes

11 sir.

12   ADMIN. JUDGE YODER: Okay.

13   MR. McMAHON: And so --

14   ADMIN. JUDGE YODER: Do you

15 disagree that the GPS data you have is

16 accurate?

17   MR. McMAHON: I have no idea

18 whether it is or not, Your Honor. It's not

19 used -- oh, I don't know what -- I don't

20 really know enough to -- I don't know, Your

21 Honor.

22   ADMIN. JUDGE YODER: Okay. Well,

5

1   you may need to address that.

2   MR. McMAHON: I don't know that

3   anybody at the Transland knows. Now maybe

4   Mobile-Max would know. Yes, but they would

5   certainly say their stuff is accurate, but I

6   don't know.

7   ADMIN. JUDGE YODER: Yes. Well,

8   we may need you to address the question of

9   whether your GPS data is accurate and whether

10 you use it in any way to check RODS. And if

11 not --

12   MR. McMAHON: What we do -- we

13 would say that the documents that were used to

14 bring this case are inadmissable because they

15 do not comply with the requirements of 386.49,

16 requiring that all written evidence should be

17 submitted with an affidavit of a person having

18 personal knowledge of the facts alleged or

19 documentary evidence in the form of exhibits

20 attached to an affidavit, identifying the

21 exhibit and giving its source. Now, Mr. Lantz

22 can't do that. And that recited the U.S.

1 <u>versus Arctic Express 194</u>.

2 ADMIN. JUDGE YODER: Do you mean

3 he can't do that because he doesn't know about

4 the data?

5 MR. McMAHON: Exactly. He doesn't

6 know where it came from or what it is or how

7 it was generated or even who generated it.

8 ADMIN. JUDGE YODER: So he brings

9 your people in and has them testify?

10 MR. McMAHON: But it's supposed to

11 be his affidavit, Your Honor, according to the

12 Sixth Circuit.

13 ADMIN. JUDGE YODER: Well, you

14 might have to prove that.

15 MR. McMAHON: Well, we asked for

16 that in discovery and the Government doesn't

17 have it.

18 ADMIN. JUDGE YODER: Doesn't have

19 what?

20 MR. McMAHON: The affidavits that

21 would   accompany   the   written   evidence,

22 defending the GPS data.

1 ADMIN. JUDGE YODER: We don't have

2 any evidence submitted in this case yet.

3 MR. McMAHON: Only through

4 discovery, Your Honor.

5 ADMIN. JUDGE YODER: I understand

6 that. But we don't have any evidence in this

7 case yet.

8 MR. McMAHON: Right. And I'm

9 suggesting that what they have is not

10 admissible under that standard.

11 ADMIN. JUDGE YODER: You're

12 telling me that you think I can't allow in the

13 record GPS data that your people testified you

14 kept and you consider it to be accurate?

15 MR. McMAHON: No. They -- they

16 wouldn't testify they kept it. They would

17 testify that their own Safety Director came to

18 them and said this fellow from the DOT is

19 doing a compliance review and he wants you --

20 us, Transland, to create a record showing time

21 and location with our GPS system. Can you do

22 that? And their IT manager said well, yes.

1   So they gave they a list of, you know, trucks

2   and dates and said, okay --

3   ADMIN. JUDGE YODER: And you think

4   if your people came in and testified to that,

5   that I wouldn't allow it to be admitted?

6   MR. McMAHON: Well, if you hand

7   him the documents that the Government seeks to

8   have admitted and say is this what you

9   produced, I'll bet -- I would think he would

10   probably, truthfully say I don't know.

11   ADMIN. JUDGE YODER: You're

12   telling me that you don't think I can get your

13   people to testify with respect to what they

14   provided to the Field Administrator?

15   MR. McMAHON: I kind of doubt that

16   Mr. van Armsdale would look at this document

17   and say well, yes, that's what I gave to Mr.

18   Mobley, who told me he was going to give it up

19   to Mr. Lantz.

20   ADMIN. JUDGE YODER: He didn't

21   keep any copies of what he gave him?

22   MR. McMAHON: I would be willing

1   to bet he didn't, but I don't really know,

2   Your Honor.

3   ADMIN. JUDGE YODER: Well, that

4   sounds like a question of proof, not a

5   question of admissability.

6   MR. McMAHON: Well then, of

7   course, we still have the question of the

8   accuracy of the data.

9   ADMIN. JUDGE YODER: I understand

10 that.

11   MR. McMAHON: Okay.

12   ADMIN. JUDGE YODER: And my

13 question to you was don't you have people who

14 can testify with respect to whether your GPS

15 data is accurate?

16   MR. McMAHON: Not so far as I've

17 been able to find out.

18   ADMIN. JUDGE YODER: What do you

19 mean?

20   MR. McMAHON: I mean, I've asked

21 that and, you know, there's no one there who

22 has sufficient knowledge to, you know, make a

1   convincing argument that this data is accurate

2   or isn't accurate.

3   ADMIN. JUDGE YODER: But they can

4   testify with respect to how it was obtained,

5   under what circumstances. And then an expert

6   could come in and testify as whether it's

7   accurate or not?

8   MR. McMAHON: Well, this is a

9   system that I've never come across before.

10   This is Mobile-Max. It's not Qualcom. So --

11   but again, you raised the question of should

12   they have known. Well, there's no way for

13   them to know because there's no document for

14   them to use to audit logs.   And the effort

15   that was required to produce the paper record

16   for the compliance review was far beyond any

17   effort that the motor carrier is required to

18   go through to create a record -- an electronic

19   -- a record -- a paper record of electronic

20   data to use to check the logs. There's just

21   no obligation. And they didn't --

22   ADMIN. JUDGE YODER: And that's

1   the issue, isn't it, Mr. McMahon?

2   MR. McMAHON: Yes. Should they

3   have known. And the answer is no.

4   ADMIN. JUDGE YODER: No. I mean,

5   you said what they had to do was well beyond

6   any obligation they have.

7   MR. McMAHON: And the agency

8   published a notice in the _Federal Register_,

9   saying they're not required to spend more than

10   about three minutes per log and make a random

11   spot check.

12   ADMIN. JUDGE YODER: But that

13   would be the issue in this case, whether, in

14   fact, they had an obligation to do that.

15   MR. McMAHON: That's right.

16   ADMIN. JUDGE YODER: Okay. All

17   right. Is Transland now checking its

18   documents with GPS?

19   MR. McMAHON: No.

20   ADMIN. JUDGE YODER: No?

21   MR. McMAHON: No. As you know,

22   that notice appeared in the _Federal Register_

1   in November, effective like tomorrow, I think.

2   ADMIN. JUDGE YODER: December 21.

3   MR. McMAHON: Is that what it is?

4   And I know that there's consideration being

5   given to certainly --

6   ADMIN. JUDGE YODER: Excuse me,

7   December 19th. That's the day after tomorrow.

8   MR. McMAHON: Okay.   I've talked

9   to people at Qualcom and in the trucking

10   industry and there is consideration being

11   given to a -- a suit under the Hobbs Act,

12   attacking doing that, without notice and

13   comment rule making. And doing it into place

14   -- putting into place and system which they

15   acknowledge exponentially increases the

16   likelihood of framing false logs. If they do

17   that, it would be well nigh impossible for us

18   -- for a trucking company to get a conditional

19   safety rating in a compliance review. Because

20   they certainly would find more than ten

21   percent false logs if they go in and use the

22   GPS data to audit logs.

1   ADMIN. JUDGE YODER: But that

2 suggests that there are an awful lot of false

3 logs.

4   MR. McMAHON: Assuming that the --

5 well, drivers are not going to be as accurate

6 as a mobile positioning satellite system. I

7 think a lot of drivers, like lawyers, in

8 filling out their time sheets, reconstruct

9 their day at the end of the day.

10   ADMIN. JUDGE YODER: Do you think

11 maybe they would be more careful about filling

12 them out if they knew they were going to be

13 checked with GPS data?

14   MR. McMAHON: I think the

15 companies would tell -- and this is the

16 concern of Qualcom's, they told me -- they

17 would tell the GPS companies we don't want

18 your GPS system. If they're going to use them

19 against us, we're not going to use it.

20   ADMIN. JUDGE YODER: So, what I

21 hear you saying is that Transland will give up

22 the use of a GPS system in order to avoid its

1 being used against them in FMCSA proceedings?

2   MR. McMAHON: I'm told that is

3 being considered by a lot of motor carriers.

4   ADMIN. JUDGE YODER: Well, if

5 that's the case, then maybe the three year

6 violation provision and settlement isn't that

7 much of a problem for you.

8   MR. McMAHON: Well, they haven't

9 given it up yet, though, Your Honor.

10   ADMIN. JUDGE YODER: Pardon me?

11   MR. McMAHON: They haven't given

12 it up yet.   And they shouldn't be forced to

13 give it up.

14   ADMIN. JUDGE YODER: That's a

15 different question.

16   MR. McMAHON: Yes. But that was --

17   ADMIN. JUDGE YODER: The question

18 is what is acceptable in the agreement and

19 what is not acceptable.   In the information

20 that has been submitted, there's a suggestion

21 that Lantz found a 36 percent falsification

22 rate.

1   MR. McMAHON: Which I don't think

2   is unusual if you use GPS.

3   ADMIN. JUDGE YODER: Okay. So you

4   think a 36 percent falsification rate is not

5   unusual?

6   MR. McMAHON: That's correct, Your

7   Honor. Because, as I said, I don't think

8   drivers make entries simultaneously with the

9   event. Although the rules require them to.

10   ADMIN. JUDGE YODER: Well, if you

11   told them they were going to be checked with

12   GPS data, don't you think they would be more

13   inclined to do that? Since they have to

14   anyway, which is what you just said.

15   MR. McMAHON: I -- you know, I'd

16   be guessing, Your Honor. I -- I don't know.

17   ADMIN. JUDGE YODER: Okay. I

18   thought, as an experienced student of the

19   human psyche, you would have a feeling as to

20   whether drivers would be more inclined to do

21   what they are supposed to do anyway if they're

22   --

1   MR. McMAHON: Oh, I think they

2 would have. If they're told by their employer

3 that we're going to use a GPS system to audit

4 your logs and if you turn in false logs and we

5 discover them through the GPS system, we're

6 going to dock your pay or fire you, yes.

7 They'd do it then. But they would start

8 looking around for somebody else who did not

9 use GPS to check logs.

10   ADMIN. JUDGE YODER: Right.

11   MR. McMAHON: To work for.

12   ADMIN. JUDGE YODER: But, if this

13 procedure goes forward, it may get harder and

14 harder to find such places.

15   MR. McMAHON: But, as I say, the

16 carriers are considering getting rid of the

17 GPS systems that generate data that can be

18 used to audit logs.

19   ADMIN. JUDGE YODER: Yes. I

20 understand that. Okay. Mr. Bell?

21   MR. BELL: Yes, Your Honor?

22   ADMIN. JUDGE YODER: Does the FOTM

1   address the need to check with GPS data?

2   MR. BELL: There is a section on

3   -- in FOTM about when a safety investigator --

4   under what circumstances, he may request GPS

5   data.

6   ADMIN. JUDGE YODER: Is there a

7   section that describes whether or when a

8   carrier should check GPS data?

9   MR. BELL: I'm not aware of one.

10   I don't think -- I think that the reason that

11   there wouldn't -- I would not think that there

12   is one because the FOTM is not addressed to

13   carriers.

14   ADMIN. JUDGE YODER: No. But it's

15   addressed to you people and, I mean, it's

16   addressed to auditors who are checking to see

17   whether a carrier should have known that

18   there's a falsification of the RODS. Does the

19   FOTM address the standard of should have

20   known?

21   MR. BELL: I'm really -- I don't

22   know whether it does or not. I'm -- I would

1   think that it does. But I don't know the

2   section, off hand.

3   ADMIN. JUDGE YODER: So you think

4   it   might   also   explore   standards   for

5   reasonableness and negligence in discovering

6   information or using GPS data?

7   MR. BELL: I don't know whether it

8   does or not.

9   MR. BELL: Can I answer that, Your

10 Honor.

11   ADMIN. JUDGE YODER: Excuse me. I

12 would like you to find out and provide any

13 such sections.

14   MR. BELL: The sections on -- on

15 new -- I'm sorry, about the standard for

16 negligence?

17   ADMIN. JUDGE YODER: Anything that

18 answers the question of knew or should have

19 known; the standard for reasonableness in

20 carrier conduct with respect to discovering

21 RODS   falsifications   or   other   record

22 inaccuracies.

1   MR. McMAHON: May I answer that,

2   Your Honor?

3   ADMIN. JUDGE YODER: Yes.

4   MR. McMAHON: I've quoted from the

5   FOTM in briefs that I've filed also with you.

6   Quoting from the FOTM, that if a carrier is to

7   be charged with a driver having falsified his

8   logs,   the   investigator   must   have   two

9   conflicting -- two documents that conflict

10   with the log, and he must verify the accuracy

11   of the log.   Now, that's not -- he's not

12   supposed to verify the accuracy of the log at

13   a hearing.   He's supposed to be -- verify the

14   accuracy of the conflicting document during

15   the investigation.

16   ADMIN. JUDGE YODER: Sure.

17   MR. McMAHON: Two documents.

18   ADMIN. JUDGE YODER: Yes.   I

19   understand that.   But my question is whether

20   there is anything specifically in the FOTM

21   that addresses the question of the standard

22   for establishing whether a carrier should have

1   known something.

2   MR. McMAHON: Not in the FOTM, but

3   certainly in the Federal Register, it's a --

4   there is a statement that carriers are

5   expected to spend not more than three minutes

6   auditing -- per log -- auditing logs. And

7   they're not required to audit all logs. A

8   random sample is sufficient.

9   ADMIN. JUDGE YODER: And you think

10   that   is   a   comprehensive   statement   of

11   everything that's in the FOTM addressing the

12   question of known or should have known?

13   MR. McMAHON: No. I think that's

14   the only --

15   ADMIN. JUDGE YODER: That's what

16   I'm asking for.

17   MR. McMAHON: Oh, sorry.

18   ADMIN. JUDGE YODER: Okay.

19   MR. McMAHON: I -- I -- that's the

20   only place I know of a statement by the

21   Government as to the duty of the carrier to

22   check the accuracy of drivers' logs.

1   ADMIN. JUDGE YODER: Which FOTM

2   are you referring to?

3   MR. McMAHON: I'm not referring to

4   the FOTM, Your Honor. I'm referring to --

5   ADMIN. JUDGE YODER: You were

6   before.

7   MR. McMAHON: Oh. Oh. Saying

8   that -- that he's not to bring a charge,

9   unless he finds two conflicting --

10   ADMIN. JUDGE YODER: Yes. You

11 were referring to a FOTM. What FOTM?

12   MR. McMAHON: Right. It was the

13 2002 version.

14   ADMIN. JUDGE YODER: Is that the

15 one that applies in this case?

16   MR. McMAHON: Your Honor, I think

17 once the Court of Appeals in the Merrick ATA

18 case approved the FOTM as complying with the

19 statutory obligation, I don't think -- the

20 agency could not change it without notice and

21 common rule making. That's the only one I

22 have.

1   ADMIN. JUDGE YODER: I think that

2 answer was I don't know.

3   MR. McMAHON: If the question is,

4 is that in the FOTM that was in effect at the

5 time of the compliance review, that's correct.

6 I don't know.

7   ADMIN. JUDGE YODER: That's what I

8 thought. Okay. I have to interpret these

9 answers, you know, because I have this idea in

10 my mind that when I ask a question, I want an

11 answer to that question. So what I hear you

12 saying in response to that question is you

13 don't know. Okay. Well, that's okay. But I

14 would like to know. And Mr. Bell, since you

15 seem to be the keeper of the key, with respect

16 to what the FOTM says, I think it's going to

17 fall on you to glean and present for our

18 edification what the FOTM says with respect to

19 when a carrier should have known something.

20 Do you understand what I'm saying?

21   MR. BELL: Yes, I do, Your Honor.

22   ADMIN. JUDGE YODER: That's good.

1   Okay. Now, so that gives you some idea of

2   what you fellows are faced with if this case

3   goes to trial. And it also, I hope, gives you

4   some idea of the likelihood that we're going

5   to find there aren't any material issues of

6   fact -- disputed issues of fact. Because it

7   strikes me that what we've been talking about

8   for the last little while has been what may

9   very well be disputed issues of fact. Are we

10 communicating? Do you want to address that

11 Mr. McMahon?

12   MR. McMAHON: I'm sorry, Your

13 Honor. Were you saying do we agree that there

14 are disputed issues of fact?

15   ADMIN. JUDGE YODER: I think

16 that's what I'm saying.

17   MR. McMAHON: Yes. Well, I -- I

18 don't -- the only one I can think of is the

19 question of whether or not Mobley told Lantz

20 that he used GPS to spot check logs. And I

21 think Mr. Bell said he wasn't going to try to

22 prove that.

1   ADMIN. JUDGE YODER: Well, that

2 was one thing. But the basic thing is what

3 should Transland do in order to know something

4 that it should have known.

5   MR. McMAHON: Well, if the

6 Government can come up the answer to that, we

7 don't have an answer, Your Honor.

8   ADMIN. JUDGE YODER: I think

9 that's an ultimate fact. But it may be

10 comprised of a lot of penultimate facts. I

11 mean, there may need to be a lot of records

12 created to demonstrate what the facts are,

13 with respect to the situation, so we can see

14 what Transland should have done.

15   MR. McMAHON: Well, we've done

16 discovery, Your Honor. And we've asked the

17 Government to produce evidence that indicates

18 that Transland knew or should have known and

19 they haven't produced anything that I believe

20 shows that. And if they haven't produced it,

21 I'd say they had an obligation to prove it,

22 but since they didn't produce it, I'd say they

1   didn't have it. So there's no issue of

2   material fact on that issue -- on that

3   question.

4   ADMIN. JUDGE YODER: Let's ask Mr.

5   Bell. Mr. Bell, do you think there are any

6   issues of fact, with respect to whether

7   Transland knew or should have known of these

8   violations?

9   MR. BELL: Well, I think that,

10 based on Your Honor's discussion of the

11 issues, I think that there is going to be need

12 for testimony on what Transland should have

13 known, both on our side to show that Transland

14 should have known that these drivers were

15 falsifying their logs, and then, I guess,

16 Transland, at that point, if we prove our

17 prima facie case, then Transland would have to

18 present evidence to show that it -- there was

19 no way that it could have known. But yes, I

20 think that it sounds as if there is a dispute

21 on that fact.

22   ADMIN. JUDGE YODER: Well, Mr.

1   McMahon?

2   MR. McMAHON: Yes, sir.

3   ADMIN. JUDGE YODER: Maybe   in

4   reviewing the transcript of this, you will

5   perceive that, in the eye of the trier of

6   fact, there are issues with respect to what

7   Transland should have known.

8   MR. McMAHON: Well, may I -- just

9   for the sake of your understanding how I would

10   advise Transland -- based on what I've been

11   hearing, the Government believes that they

12   would go forward with the proof and offer

13   evidence showing that Transland should have

14   known that these violations occurred. It is

15   clear, at this point, that the only evidence

16   that the Government has is paper records

17   created during the compliance review by the

18   manager of IT at Transland.   They did not

19   exist prior to the compliance review. There

20   was no way that Transland could have

21   discovered these violations without the

22   creation of the records that were demanded

1 during the compliance review. They had no

2 obligation to create such records.

3 ADMIN. JUDGE YODER: Well, that's

4 what remains to be determined, isn't it?

5 MR. McMAHON: Well, yes. But I

6 don't think it's going to require an awful lot

7 of testimony or proof.

8 ADMIN. JUDGE YODER: Well, I don't

9 know how much an awful lot is for you. But,

10 what we would start to do, I suppose, is to

11 find out what the facts are with respect to

12 what documents and sources of information

13 there were and what Transland could reasonably

14 have been expected to glean from those

15 documents. And --

16 MR. McMAHON: Well, we did go

17 through --

18 ADMIN. JUDGE YODER: No. You've

19 got to let me finish.

20 MR. McMAHON: I'm sorry, Your

21 Honor.

22 ADMIN. JUDGE YODER: That's one of

1   the rules.

2   MR. McMAHON: I'm sorry.

3   ADMIN. JUDGE YODER: Yes.   And I

4   would suppose that there might be testimony

5   with respect to industry practice, in terms of

6   what might give rise to a duty to inquire or

7   a need to pursue further.   We've had the

8   suggestion from Mr. Lantz that agreement

9   between fuel records and RODS suggests a need

10   to look further.   You might have people who

11   would disagree with that.   You've suggested as

12   much in this pre-hearing conference.   It

13   strikes me that that may be an issue of fact.

14   And the question is how far does Transland

15   need to go in trying to ascertain whether

16   these RODS, which are alleged to be false,

17   whether they, in fact were or weren't false.

18   And I don't know of any precedent, legally, to

19   help us on that subject.   If you do, then I'll

20   be very happy to see that in your response.

21   MR.   McMAHON: Well,   could   I

22   comment on what's in the record now in support

1   of our motion for a final order?

2   ADMIN. JUDGE YODER: Certainly.

3   MR. McMAHON: We -- Transland

4   employed a retired or a former Office of Motor

5   Carrier, DOT, FMSCA investigator who, during

6   his career, conducted compliance reviews. And

7   he replicated the compliance review done by

8   Mr. Lantz, using the supporting documents --

9   paper supporting documents that were given to

10   Mr. Lantz, and did a compliance review, as

11   would normally be done, and found something

12   less than four percent false logs. So that's

13   in the record now, Your Honor.

14   ADMIN. JUDGE YODER: Excuse me,

15   Mr. McMahon. Nothing is in the record now.

16   Nothing.

17   MR. McMAHON: Or, in the file

18   then.

19   ADMIN. JUDGE YODER: Excuse me.

20   We are in a pre-hearing phase. Nothing gets

21   in the record until I put it in the record.

22   There is nothing in the record.

1   MR. McMAHON: But   that   is

2   something that is in the file in support of a

3   motion for a dispositive order.

4   ADMIN. JUDGE YODER: Yes.   I

5   understand that.   And you can read the

6   transcript and decide for yourself whether you

7   think it's likely that those dispositive

8   orders -- well, Mr. Bell has already said that

9   he thinks there are material issues of fact,

10   so we can treat his motion as moot. And you

11   can look at the record of this transcript and

12   decide whether you think it's likely that

13   there's going to be a determination in favor

14   of Transland on the issue of whether there are

15   no disputed issues of fact. But I will leave

16   that to your good judgment, okay?

17   Meanwhile, we have in front of us

18   an agreement which purports to settle this

19   proceeding. And the issue is how much more

20   time, effort, and expense do the parties

21   choose to put into this matter, or is it

22   possible to effectuate the settlement which

1 has been agreed to.

2 Now, my concern, Mr. Bell, I've

3 already indicated, with respect to this

4 agreement. And I have serious question as to

5 whether it's in the public interest to approve

6 a settlement which one of the parties has said

7 that they don't want to agree to. And they

8 have suggested that it was inappropriate for

9 them to not have been advised that this was

10 under negotiation between the parties, without

11 counsel for one of the parties knowing about

12 it. And I'd just as soon not get into trying

13 the question of whether that is or is not

14 appropriate, particularly if the matter can be

15 settled.

16 So, what I'd like to do, Mr.

17 McMahon, is look at this agreement and, just

18 for purpose of discussion, assume that, if

19 there is not agreement, you're looking at a

20 hearing, okay?

21 MR. McMAHON: Right.

22 ADMIN. JUDGE YODER: What about

1 this agreement is unacceptable from

2 Transland's standpoint? Number one, I gather

3 that Transland has agreed to an amount, with

4 respect to settling it. Now, I'm not saying

5 that that amount can or couldn't change. But

6 at least there was an agreement with respect

7 to that amount, which was incorporated in this

8 settlement agreement. There was -- there is

9 a provision in here with respect to violations

10 occurring in three years. Now, if GPS is

11 used, I would suppose that might reduce

12 violations. If it isn't used, then it's not

13 going to be available to provide the basis for

14 violations. So that may cut both ways, with

15 respect to the acceptability of a violation

16 term. I would suggest, Mr. McMahon, you

17 really need to look at the previous

18 settlement, because I think that you'll find

19 that the terms in the previous settlement very

20 closely track some of the terms in this one,

21 which you were expressing concern about.

22 Now, the previous agreement did

1   have a two year term, rather than a three year

2   term. And you folks might look at whether it

3   is possible to massage that term in some way.

4   I think it's important that both parties

5   recognize that the playing field may have

6   changed somewhat since this agreement was

7   negotiated, with the adoption of a new

8   regulation which, in essence, creates a new

9   regulatory regime.   It may be that some

10   attention could be paid to whether some

11   specific reference to GPS might or might not

12   be appropriate. I don't want to venture into

13   that territory.   I'm just trying to suggest

14   some avenues for you folks to pursue.

15   In case you haven't gathered, what

16   I am headed toward is suggesting that you

17   folks go back to the table and try to achieve

18   an agreed settlement of these proceedings.

19   And I will hold everything else in abeyance

20   until I hear from you folks.

21   Now, I know that Mr. McMahon was

22   concerned about the need to make a payment

1 pursuant to this agreement on December 31st.

2 And, of course, I think Mr. Bell agrees that

3 there really isn't an agreement until I

4 approve it. Is that right, Mr. Bell?

5 MR. BELL: That is right.

6 ADMIN. JUDGE YODER: And so, if I

7 don't approve it, then there is no first

8 payment due on December 31. Is that correct?

9 MR. BELL: I think that that term

10 would have to be amended to fit with whenever

11 it was approved. Yes.

12 ADMIN. JUDGE YODER: Well, you'd

13 need to get a new payment schedule. All I'm

14 trying to establish, on the record, is that

15 Mr. McMahon doesn't have to concern himself

16 with a December 31 first payment date or any

17 of the other payment dates set forth in that

18 schedule. In essence, we will place this

19 agreement on the table and let you folks try

20 to come up with something that you both agree

21 to. Does that sound satisfactory to the two

22 of you?

1   MR. McMAHON: Well, Your Honor.

2   I've settled many of these cases, indeed, with

3   other lawyers in Mr. Bell's office there in

4   Baltimore. But I've never agreed or had a

5   client agree to that agreement. We've settled

6   them on the basis that the Respondent neither

7   admits or denies that the violation was

8   committed and the settlement and payment does

9   not constitute an admission or a finding that

10   a violation occurred and that the payment of

11   the agreed amount would not have an adverse

12   impact on the carrier's safe-stat score.

13   We've done that. I'm sure Transland would

14   like to settle this case. It's bleeding them

15   dry.   So --

16   ADMIN. JUDGE YODER: Well, Mr.

17   McMahon, I hope you aren't missing the purport

18   of what I've been doing with your folks for

19   the last two and a half hours.

20   MR. McMAHON: I don't think so,

21   Your Honor.

22   ADMIN. JUDGE YODER: I have been

1   trying to lead you folks to water.

2   MR. McMAHON: Right.

3   ADMIN. JUDGE YODER: In the hopes

4   that you might drink.

5   MR.   McMAHON: That   was   my

6   impression.

7   ADMIN. JUDGE YODER: I'm not

8   telling you what should be in a settlement

9   agreement. I am telling you that I will, if

10   you folks agree, hold this in abeyance until

11   I hear back from you at a date certain. And

12   my question to you was is that okay with you.

13   MR. McMAHON: It's okay with me,

14   Your Honor.

15   ADMIN. JUDGE YODER: Well, okay.

16   That's a better answer than I got last time.

17   Or at least I think it is.

18   MR. McMAHON: It takes time, but I

19   learn eventually.

20   ADMIN. JUDGE YODER: Well, there's

21   always hope. When you get as old as I am, you

22   just keep waiting and hoping. Now, Mr. Bell?

1   MR. BELL: That's fine with me.

2   ADMIN. JUDGE YODER: Okay. Then

3   let me just proceed with a few things I have

4   here. We had the late penalty payment and

5   there was an objection to that. Again, Mr.

6   McMahon, that is a provision that I've seen

7   time and again.   If you don't make the

8   payments when you're supposed to, the entire

9   amount normally becomes due and owing. I'm

10   not saying that's the way you need to arrange

11   this. And you folks can decide what you can

12   and can't do and should and shouldn't do. All

13   I'm suggesting is that if you don't do

14   something, I think you're looking at a

15   hearing. And I think you're looking at a

16   hearing that is going to trod new ground, if

17   you will, in terms of examining of what the

18   FOTM says about what people have a reason to

19   know, in terms of what the law says about what

20   is reasonable to expect of a carrier in terms

21   of policing its own data and utilizing

22   whatever resources it has to make sure that

1 they are accurate. And I don't think we're

2 going to find a lot of precedential help on

3 that. So what we're going to be looking at in

4 a hearing is something that canvasses the area

5 to see what the facts are with respect to

6 those issues.

7 Now, okay. Now, let's see. We

8 have a pending motion to dismiss as the

9 individual Respondents. And I didn't look,

10 but I assume that this settlement was intended

11 to related to everybody. Is that right, Mr.

12 Bell?

13 MR. BELL: No, Your Honor. It's

14 only for the company.

15 ADMIN. JUDGE YODER: You propose

16 to settle this for the company and leave the

17 drivers' complaints pending?

18 MR. BELL: At this point, the

19 drivers' cases have not -- are not

20 consolidated. At least not that I'm aware of.

21 ADMIN. JUDGE YODER: Have you

22 looked at the orders on the pre-hearing

1 conference?

2   MR. BELL: The order on the pre-

3 hearing conference?

4   ADMIN. JUDGE YODER: Yes, sir.

5 Setting this pre-hearing conference.

6   MR. BELL: I'm sorry. I must have

7 missed that. Did that consolidate the cases?

8   ADMIN. JUDGE YODER: Well, I

9 didn't say it consolidated the cases. But

10 you'll notice that it references all the

11 cases. And when I started today, I referenced

12 all the documents.

13   MR. BELL: Yes, Your Honor. But,

14 as far as the settlement agreement, the

15 settlement agreement was only specifically

16 related to the company case and not to the

17 driver cases. And I --

18   ADMIN. JUDGE YODER: I cannot

19 imagine a situation in which I would approve

20 a settlement agreement that related only to

21 the company and not to the drivers. That

22 would strike me as an incredible waste of

1   Government and Respondent resources.

2   MR. BELL: I think that --

3   ADMIN. JUDGE YODER: You can try

4   to convince me to the contrary.

5   MR. BELL: No. I'm not going to

6   try to convince you to the contrary, Your

7   Honor.

8   ADMIN. JUDGE YODER: You've

9   already been paid the penalties in those

10   cases.

11   MR. BELL: That was where I was

12   going with this, in that, if we can reach an

13   agreement on the company's, I think that what

14   we can do -- the Field Administrator can do is

15   withdraw his objection to the drivers' motions

16   to dismiss. If we can reach an agreement on

17   the company.

18   ADMIN. JUDGE YODER: Well, let me

19   say, if you're going to submit something to me

20   for approval, you'd better.

21   MR. BELL: I think that that would

22   be the position the Field Administrator would

1   take, if we reached a settlement on the

2   company.

3   ADMIN. JUDGE YODER: I'm not

4   saying you'd better do that. I'm saying you'd

5   better resolve all of these. Don't give me a

6   settlement for Transland and leave how ever

7   many individual Respondents there are,

8   hanging. Okay?

9   MR. BELL: Yes, Your Honor.

10   MR. McMAHON: Can I ask -- is it

11   all right if I ask the status of where we are

12   right now, Your Honor?

13   ADMIN. JUDGE YODER: Where we are?

14   MR. McMAHON: Yes.

15   ADMIN. JUDGE YODER: Well, I'm

16   just about to finish.

17   MR. McMAHON: Oh, I'm sorry.

18   ADMIN. JUDGE YODER: Yes. In the

19   motion to dismiss the individual Respondents,

20   the answer objecting to that said there was a

21   memorandum attached to the answer, Mr. Bell?

22   MR. BELL: That may have been -- I

1 believe that they were -- that they were

2 combined together -- to motion and the

3 memorandum.

4 ADMIN. JUDGE YODER: Okay.

5 MR. BELL: And I -- that may have

6 been a typographical error.

7 ADMIN. JUDGE YODER: All right.

8 So there was no memorandum attached? Okay.

9 I assume that there aren't any other pending

10 matters that we need to consider, like

11 discovery or subpoenas or things of that sort.

12 And I assume that, in whatever resolution

13 occurs, you folks will appropriately consider

14 ability to pay, to the extent that that's

15 necessary.

16 MR. McMAHON: On that subject of

17 pending matters, is it my understanding, or is

18 my understanding correct that you've directed

19 Mr. Bell to tell us what the FOTM says as to

20 the duty of the carrier to -- or what the FOTM

21 says about showing that a carrier knew or

22 should have known? And knowing that would

1   certainly --

2   ADMIN. JUDGE YODER: We'll set up

3   a schedule. We'll set up a schedule and my

4   thought was that we would set a schedule for

5   you folks to get back to me on a revised

6   settlement proposal. And if that settlement

7   does not occur, we would set a further date

8   for submission of additional documentation,

9   including the FOTMs and the brief on should

10   have known.

11   MR. McMAHON: For the purposes of

12   settlement, it would help to advise -- me

13   advise the client as to its position as to

14   whether or not he met a standard. And if we

15   knew what the standard was, that would be

16   helpful.

17   ADMIN. JUDGE YODER: I see. Mr.

18   Bell,   is   that   information   on   the   FOTM

19   something you could provide within a discreet

20   period of time?

21   MR. BELL: I'm not sure that it is

22   because I don't know that every answer to

1   every question is going to be encapsulated in

2   the FOTM.

3   ADMIN. JUDGE YODER: That's fine.

4   We'll give you a larger discreet period of

5   time.

6   MR. BELL: Thank you, Your Honor.

7   ADMIN. JUDGE YODER: Okay. So

8   should we then have a FOTM date, a settlement

9   date, and a brief date, in that order? Does

10   that satisfy everybody?

11   MR. McMAHON: That is fine with

12   me, Your Honor.

13   ADMIN. JUDGE YODER: Mr. Bell?

14   MR. BELL: The FOTM, as far as a

15   description of what's in the FOTM, or a --

16   ADMIN. JUDGE YODER: No. Copies

17   of whatever is in the FOTM on the subject we

18   discussed.

19   MR. BELL: Copies of what's in the

20   FOTM on the -- yes, Your Honor. That's

21   satisfactory.

22   ADMIN. JUDGE YODER: Okay. What

1   date would you like for that? Does a month

2   work?

3   MR. BELL: Yes, Your Honor.

4   ADMIN. JUDGE YODER: That would be

5   January 16th. Okay. And the transcript

6   should be available in five days, I believe.

7   Mr. McMahon, I think you know the routine

8   here. A copy of the transcript automatically

9   goes to me and to the Field Administrator

10   because they pay for the transcript. And you

11   need to arrange a copy with the court

12   reporter. The transcript eventually winds up

13   in the case -- in the Federal Docket

14   Management System. And you can download it

15   from there. But eventually, I can't tell you

16   how long eventually is.

17   MR. McMAHON: I don't know how to

18   communicate with the court reporter, Your

19   Honor.

20   ADMIN. JUDGE YODER: Well, you can

21   work that out with -- it's Neil Gross.

22   MR. McMAHON: Oh, N-E-I-L?

1   ADMIN. JUDGE YODER: Yes. G-R-O-

2   S-S. And he can give you their address as

3   soon as we finish, or their telephone number.

4   Okay?

5   MR. McMAHON: Okay.

6   ADMIN. JUDGE YODER: So then we

7   need a date by which you folks will get back

8   to me on a proposed revised settlement

9   agreement, which will also incorporate the

10   changes that I identified as necessary. And

11   does another month seem necessary or

12   appropriate, or do you have some other --

13   MR. McMAHON: I would think a

14   couple of weeks would do it, Your Honor.

15   MR. BELL: I agree. The end of

16   January.

17   ADMIN. JUDGE YODER: Okay. We'll

18   make that the 30th. So the 30th will be the

19   date for submission of a settlement. And, if

20   we don't get a settlement, then I'm going to

21   need briefs on should have known, referring to

22   whatever regulations, modem material -- modem

1 material, I mean, and precedence that there

2 may be on that subject, specifically as it

3 relates to the putative or prospective facts

4 that would need to be tried. Okay. So when

5 do you want that date? Another two weeks?

6   MR. McMAHON: How about a little

7 longer than that, Your Honor?

8   ADMIN. JUDGE YODER: What do you

9 want? Do you want a month on that?

10   MR. McMAHON: Yes, sir.

11   ADMIN. JUDGE YODER: Okay. That

12 would be February -- no, a month would --

13   MR. McMAHON: About the end of

14 February.

15   ADMIN. JUDGE YODER: February 28

16 would be a real date. That would work.

17   MR. McMAHON: Okay.

18   ADMIN. JUDGE YODER: Okay. So

19 February 28. And then, if anybody needs to

20 respond to that, they can do it within a week?

21 That would be March 7th. Okay?

22   MR. McMAHON: Okay.

1   ADMIN. JUDGE YODER: All right.

2   Now, is there anything further that you

3   gentlemen want to discuss?

4   MR. McMAHON: Not I, Your Honor.

5   ADMIN. JUDGE YODER: Mr. Bell?

6   MR. BELL: Very briefly, Your

7   Honor. Am I to understand that -- I don't

8   think that it was said explicitly, but the

9   settlement agreement, as it exists, has been

10   rejected by the Administrative Law Judge?

11   ADMIN. JUDGE YODER: No. No.   I

12   didn't say that.

13   MR. BELL: Okay.

14   ADMIN. JUDGE YODER: I said we

15   would put it on the table and let you folks

16   try to work out something consistent with the

17   conversations we've had today.   Does that

18   answer your question?

19   MR. BELL: Thank you, Your Honor.

20   It does, thank you.

21   ADMIN. JUDGE YODER: Okay.

22   Regulations say I can approve it, reject it,

1   or do other things. This is one of the other

2   things. Okay?

3   MR. BELL: Okay.

4   ADMIN. JUDGE YODER: All right.

5   Thank you both, very much. And we will hear

6   from you.

7   MR. McMAHON: Thank you, Your

8   Honor.

9   MR. BELL: Thank you, Your Honor.

10   ADMIN. JUDGE YODER: That's the

11   end of our pre-hearing conference.

12   (Whereupon,   the   pre-hearing

13   conference was concluded at approximately 4:47

14   p.m.)

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CERTIFICATE

This is to certify that the foregoing transcript

in the matter of: Transland Inc., et al

Before: The Honorable Ronnie Yoder,
                           Chief Administrative Law Judge

Date: December 17, 2008

Place: Washington, DC

represents the full and complete proceedings of the

aforementioned matter, as reported and reduced to

typewriting.

_____
John Mongoven
Official Reporter
Neal R Gross & Co., Inc.